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No. 01-937

IN THE

Supreme Court of the United States

KARIN SKOLD VAN SLYKE,
Petitioner,

v.

NORTHROP GRUMMAN CORPORATION.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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The Court of Appeals has sanctioned an abrupt departure from this Court's Title VII jurisprudence. The law is unambiguous: after a plaintiff establishes a prima facie case of discrimination, the defendant employer has the burden of "clearly set[ting] forth . . . the reasons for the plaintiff's rejection." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). This burden is one of production, not persuasion, but the focus must be on the defendant's motivation "at the time of the decision" under challenge. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995), *quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989). In particular, a *post hoc* justification will not suffice. *See id.* ("'proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made'").

In the present case, Northrop Grumman flouted this precedent by asserting a defense that plainly—admittedly—did not motivate company officials "at the time of the decision." Instead, Northrop fashioned a *post hoc* rationale for its conduct. The district court acquiesced and the Fourth Circuit affirmed, becoming the only Court of Appeals to permit such a temporally deficient defense in a Title VII case.

I. THE RECORD

In 1997 Northrop Grumman promoted three men to Code 36 program management positions in petitioner Karin Van Slyke's department. Van Slyke was the only woman among the 30 engineers in the department, and she was also the only engineer denied Code 36 status.

Surveying the record, the Court of Appeals noted that Northrop "concede[d] that Van Slyke . . . was not considered" for the jobs to which the men were promoted in 1997. Pet. App. A, 4a. This was true even though Northrop "knew Van Slyke sought a Code 36 promotion," *id.*, 2a, and "concede[d] that [she] could have held the specific positions" given to the three men. *Id.*, 4a.

Northrop cannot deny these facts. Instead, it bobs and weaves, on occasion resorting to sleight of hand. Twice, for example, the company announces in bold type that Van Slyke "did not seek" the positions awarded the three men. Brief in Opposition (Br. Opp.) 2, 6. True, but neither did the men. As the district court observed, Northrop "admits that it has a very informal promotion structure in which *applications for program management positions are not accepted, positions are not posted,* and department managers consider employees based on their skills and current job responsibilities." Pet. App. B, 16a (emphasis supplied).

In short, Northrop did not post Code 36 positions, so no one applied for them. Instead, management reached out and

tapped employees for promotion to Code 36. And in Van Slyke's department, all 29 men had been anointed in this fashion; only she was overlooked.

Northrop concedes that its managers did not compare Van Slyke's qualifications with those of the men when deciding whom to promote to Code 36 positions in 1997. Br. Opp. 6 ("Northrop Grumman did not base its promotion decisions on a one-to-one comparison" of Van Slyke and the three men). Indeed, much of its brief is an effort to excuse that failure of comparison. In the courts below, however, Northrop presented an unvarnished "superior qualifications" defense predicated on the very comparison of credentials that it now tries to downplay: "Defendant proffers that the men promoted were better qualified than Plaintiff for the positions." Pet. App. B, 19a. The company cannot back away from this defense just because its *post hoc* character is now evident.

In any event, there is no support in the record for Northrop's attempt to justify its admitted failure to consider Van Slyke for the three Code 36 positions filled in 1997. For example, the company writes as if elevation to Code 36 were a promotion in place in the same job. No citation is offered for this proposition, and it is not so. Code 36 embraces discrete program management positions, in which the incumbents are responsible for running one of the company's defense or civil aviation projects. *See* Pet. App. A, 2a. Openings arise in specific positions at the Code 36 level but, as noted previously, these vacancies are not posted. For this reason, the district court said that Van Slyke did not have to "formally apply for a specific program management position" in order to demonstrate her interest in promotion to Code 36, Pet. App. B, 16a-17a, since she "would have applied for (and accepted) a program management position had she been aware of one." *Id.*, 17a. Code 36 management positions are distinct from lower rated jobs; they are simply not advertised.

Northrop stresses that the three men promoted to Code 36 positions in 1997 were assessed for promotion based in part on their performance in their own jobs. But that is hardly noteworthy; every employer bases its promotion decisions (at least in part) on its employees' performance in their current positions. The salient fact, which is undisputed, is that the company's managers did not compare Van Slyke's performance in *her* job with that of the men when making promotion decisions in 1997. Similarly, the noncompetitive nature of Northrop's management promotion system, which the company highlights, means only that Code 36 positions were not formally posted for competition; it does not mean that its managers could not compare the credentials of likely candidates. Indeed, Northrop's defense below was founded on the notion that such comparisons were made. But if in fact the men were competing only against themselves in 1997, this simply confirms the *post hoc* nature of the company's "superior qualifications" rationale for rejecting Van Slyke's promotion.

Early in its brief, Northrop makes the baffling assertion that "[t]he promotion of three men to Code 36 positions did not affect [Van Slyke's] promotional opportunities in any way," either in 1997 or at "any time thereafter." Br. Opp. 2. But this case is about the three Code 36 positions filled by men in 1997. It is undisputed that Van Slyke made a prima facie showing that her rejection *for those jobs* was the product of sex discrimination. In these circumstances, Northrop's burden was to "clearly set forth, through the introduction of admissible evidence, the reasons for [Van Slyke's] rejection" for the positions filled in 1997. *Burdine*, 450 U.S. at 254. Talk of the possibility of promotion to *other* jobs does not satisfy this burden.

Nor is Northrop's case helped by the company's persistent disparagement of Van Slyke's capabilities. As the Court of Appeals observed, Northrop has "concede[d] that Van Slyke could have held the specific positions" given to the men.

App. A, 4a. And the district court, pointing to Van Slyke's "superior performance evaluations over the years and past management and leadership experience in a broad range of programs," said that she was "arguably *as qualified as* the three men promoted." App. B, 23a (emphasis in original).

As noted above, much of Northrop's brief is a misguided effort to justify the company's admitted failure to consider Van Slyke for the Code 36 jobs filled in 1997. At times, though, Northrop shifts gears and suggests that Van Slyke was in fact considered for those positions. *See* Br. Opp. 8 (saying that the company "relied on job performance and employee qualifications in promoting [the three men] and in failing to promote her"). Yet two pages earlier, Northrop concedes—as it must—that Van Slyke was *not* considered for these three jobs. *See id.* at 6 (referring to "the fact that Van Slyke was not considered for the three specific positions").

The record is clear. In the courts below, Northrop "concede[d] that Van Slyke . . . was not considered" for the three jobs at issue. Pet. App. A, 4a. No amount of straining can overcome the admitted fact that Northrop Grumman did not consider Karin Van Slyke for the three Code 36 positions filled by men in 1997.

Northrop prevailed in this case by asserting in the district court that "the men promoted were better qualified than Plaintiff for the positions" at issue. Pet. App. B, 19a. But that was not—could not have been—the motivation of Van Slyke's managers "at the time of the decision," since they did not even consider her for the three Code 36 jobs in question. Northrop's explanation is a quintessential *post hoc* defense.

II. THE DEPARTURE FROM THIS COURT'S PRECEDENT

This Court's precedent is clear: a Title VII defendant may not respond to a prima facie case under *Burdine* by asserting a rationale that did not motivate it at the time of the

challenged decision. Northrop does not appear to dispute the vitality of this principle, saying "this is not an unsettled area of the law." Br. Opp. 7.

The company quibbles about petitioner's citation of such cases as *McKennon, supra*, since the present case is not about "after-acquired evidence." In *McKennon*, however, the Court held that information acquired by a company *after* making an allegedly discriminatory decision does not affect its liability for that action. And this is precisely because liability is gauged by the defendant's motivation "at the time of the decision." *McKennon*, 513 U.S. at 360, *quoting Price Waterhouse v. Hopkins*, 490 U.S. at 252. This is a bedrock Title VII principle, and it applies here. It precludes Northrop from arguing that the men promoted to three Code 36 positions were better qualified than Van Slyke for those jobs, when the responsible officials did not consider her at the time they filled the positions in 1997.

Northrop says repeatedly that the three men promoted were qualified for their new positions. Even if true, that assertion—by itself—does not meet the standard imposed by *Burdine*, under which "the defendant must clearly set forth . . . the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant." 450 U.S. at 254 (footnote omitted). An explanation grounded on qualifications is not "legally sufficient to justify a judgment for the defendant" if it speaks solely to the credentials of the man chosen; the decision-maker necessarily must also say that he thought that the man was better qualified than the woman rejected for the job at hand. This is only a burden of production; it is not onerous and Title VII defendants routinely satisfy it. But in the present case, Van Slyke's managers could not say that they believed in 1997 that the men chosen for promotion were better qualified than she was, because they admitted that they did not

consider her at all. Facing this quandary, Northrop fashioned a *post hoc* "superior qualifications" defense, and the courts below erred in accepting it.

Apart from the Fourth Circuit here, the other Courts of Appeals have followed this Court's lead and have not allowed Title VII defendants to assert defenses that did not animate them "at the time of the decision." *See* cases cited at page 6 of the Petition. Northrop attempts to distinguish some of these decisions, but they are apposite.

For example, in *Joshi v. Florida State University Health Center*, 763 F.2d 1227 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985), the decision-makers were generally aware of the plaintiff's qualifications, because she had earlier applied for other positions. She had not, however, been considered for the job at issue. As Van Slyke did here, the plaintiff established a prima facie case of sex discrimination, and the defendant responded—as Northrop did—by asserting "that the males hired or offered the position were at least as qualified as she." *Id.* at 1235. This explanation did not pass muster under *Burdine*:

> [the] articulated reason is insufficient as a matter of law. * * * Because [plaintiff] was not considered, her qualifications were not compared to those of the male applicants and hence, the relative qualifications of those applicants cannot be a reason for the defendants' failure to hire her.

Id.

The Eleventh Circuit in *Joshi* cited its earlier decision in *Eastland v. Tennessee Valley Authority*, 704 F.2d 613 (11th Cir.) *cert. denied*, 465 U.S. 1066 (1984), in which the court relied on *Burdine* and ruled that the defendant's "decision cannot be defended on the basis of the relative qualifications of the applicants if these qualifications were not considered." *Id.* at 626. In similar fashion, the First Circuit in *Sabree v.*

United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396 (1st Cir. 1990), held that "a defendant may not invent a *post hoc* rationalization for its actions * * * Unless, therefore, a defendant articulates a 'legitimate non-discriminatory reason' that *actually* motivated the decision, the reason is legally insufficient." *Id.* at 404 (emphasis in original). And in *Lams v. General Waterworks Corp.*, 766 F.2d 386 (8th Cir. 1985), in which the plaintiffs "never were actually considered for the positions in dispute, and thus were not compared with the successful candidates," *id.* at 391, defendant's "*post hoc* comparisons" did not suffice. *Id.* at 393.

Except for the Fourth Circuit here, the Courts of Appeals understand that a Title VII defendant responding to a prima facie case must articulate "a 'legitimate non-discriminatory reason' that *actually* motivated the decision." *Sabree*, 921 F.2d at 404 (emphasis in original). Otherwise, "the reason is legally insufficient." *Id.* In *Joshi* and *Lams*, the courts made factual findings that the plaintiffs were not considered for the positions at issue. *See* 763 F.2d at 1235 ("[t]he district court found that 'the plaintiff was not actively considered for hiring' "); 766 F.2d at 391 ("the evidence distinctly shows that plaintiffs never were actually considered for the positions in dispute"). In the present case, Northrop has conceded this dispositive fact. The result is the same: "Because [Van Slyke] was not considered, her qualifications were not compared to those of the [three promoted men] and hence, the relative qualifications of [the men] cannot be a reason for [Northrop's] failure to [promote] her." *See Joshi*, 763 F.2d at 1235.

The defendant's burden of production under *Burdine* is modest, and most employers easily satisfy it. But this Court anticipated that the burden would not always be met, *see* 450 U.S. at 254, and that is the case here.

Finally, the focus of this Petition is on the first question presented—*i.e.*, whether a "superior qualifications" defense is available to an employer who did not in fact engage in comparison of credentials. The answer is quite clearly "no," as Northrop appears to agree. But even assuming that the company was entitled to assert this defense, summary judgment in its favor was manifestly improper, since the district court said that the record would support a finding that Van Slyke was as qualified as the men promoted to Code 36, and her rejection occurred in a setting in which all 29 men in her department had been accorded Code 36 status. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000) (a court considering summary judgment "must draw all reasonable inferences in favor of the [employee]" and "must disregard all evidence favorable to the [employer] that the jury is not required to believe").

The *Reeves* issue is the second question presented by this Petition. This Court need not reach it, though, because Northrop was not entitled to a "superior qualifications" defense in the first instance.

Northrop says that this is an ordinary Title VII case. But it is far from ordinary in its misapplication of settled law. The Court of Appeals plainly erred in permitting Northrop Grumman to defend its rejection of Karin Van Slyke by asserting an explanation that did not motivate company officials "at the time of the decision." This error is so palpable that summary reversal may be appropriate.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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